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In the Supreme Court of the United States

OCTOBER TERM, 1946.

No. .....

JAMES W. BEACH,
Executor Under the Will of Harry L. Beach, Deceased,
Petitioner,

vs.

HARRY F. BUSEY,
Collector of Internal Revenue,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Sixth Circuit.

The petitioner, James W. Beach, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit entered in the above case on July 15, 1946 affirming the judgment of the United States District Court for the Southern District of Ohio, Eastern Division.

Opinions Below.

The memorandum opinion of the District Court (R. 21-24) is reported in 64 F. Supp. 220. The opinion of the Circuit Court of Appeals (R. 35-39) is reported in 156 F. (2d) 496.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on July 15, 1946 (R. 33). The time within which to file this petition was extended to November 15, 1946 by an order signed by Mr. Justice Reed on October 2, 1946 (R. 43). The time was further extended to December 14, 1946

by an order signed by Mr. Justice Reed on November 8, 1946 (R. 43). Jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended. 28 U. S. C. § 347(a).

Statute and Regulations Involved.

Section 811 (c), Internal Revenue Code:

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property * * * (c) * * * to the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise * * * intended to take effect in possession or enjoyment at or after his death * * *

The regulations are quoted in the Appendix.

Question Presented.

Does section 811(c) authorize the imposition of federal estate tax upon two irrevocable transfers in trust where the remainder interests were successively limited to lineal descendants and collateral heirs of the settlor and the settlor expressly provided that he should have no further interest in the property transferred to the trusts?

Statement.

Petitioner is executor under the will of Harry L. Beach, the decedent. On March 2, 1925, and January 23, 1926, the decedent and his wife, Elizabeth C. Beach, executed and delivered identical trust indentures in which two irrevocable trusts were established and a bank was named trustee (R. 8, 14). United States Bonds in the principal amount of $200,000 were transferred to the trustee, the decedent transferring $160,000 and his wife transferring $40,000 (R. 8, 14). Income of the trusts was made payable to the decedent's wife during the life of the decedent (R. 9, 14). Upon the death of the decedent, the income was made payable to the decedent's wife and Camilla Beach, a

daughter who was an invalid unable to support or care for herself; and, upon the death at any time of either the wife or the daughter, the income was made payable to the survivor during her lifetime (R. 9, 14-15).

In the words of the indentures, the trusts were "not revocable by any action of the Settlors hereunder, all of the Settlors' rights as to said property having terminated upon the execution of this agreement, except as provided herein."[1] (R. 12, 17.) The trusts were to terminate upon the death of the survivor of the decedent's wife and the daughter (R. 9, 15). Upon termination of the trusts, the trust funds were to be "distributed according to the Statutes of descent and distribution of the State of Ohio, to the heirs at law[2] of Harry L. Beach and Elizabeth C. Beach, providing the heirs[2] of both Harry L. Beach and Elizabeth C. Beach are the same persons." (R. 9, 15.) If the decedent and his wife left no lineal descendants of their direct line and the next of kin were collateral heirs, then the trust funds were to be "distributed eighty (80%) per cent to said collateral heirs at law of Harry L. Beach, and twenty (20%) per cent to the said collateral heirs at law of Elizabeth C. Beach." (R. 10, 15.) These are the only provisions relating to disposition of the trust funds after the death of the decedent's wife and daughter, and are copied in full in the margin.[3]

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[1] The exception related only to the decedent's right, never exercised, to veto the sale of trust property (R. 11, 17).

[2] The Circuit Court of Appeals agreed with petitioner that the words "heirs at law" and "heirs" mean, and were intended to mean, "lineal descendants" (R. 38, 39).

[3] "2. This trust shall terminate upon the death of the last survivor of the Settlor, Elizabeth C. Beach and the daughter of said Settlors, Camilla Beach, and upon the termination of this Trust said trust fund, together with any accumulations thereof, shall be distributed according to the Statutes of descent and distribution of the State of Ohio, to the heirs at law of Harry L. Beach

(Continued on following page)

At the time the first indenture was executed, the decedent was 55 years of age (R. 7). He and his wife then had three children and two grandchildren living (R. 6). When the second indenture was executed, the decedent was 56 years of age and had three children and three grandchildren living (R. 7). He died on March 25, 1942, survived by his wife and daughter who were the two life tenants, and by two other children and four grandchildren (R. 6-7).

On June 24, 1943, petitioner paid respondent under protest the sum of $18,655.70 which represented the federal estate tax, less state inheritance tax credits, imposed by deficiency assessment on the value at decedent's death of eighty per cent of the value of the remainders after the death of the two life tenants (R. 5-6). Thereafter, petitioner filed a claim for refund of this amount and, when it was rejected in its entirety, brought suit in the District Court (R. 1-3, 5). From a judgment in favor of respondent (R. 24), petitioner appealed to the Circuit Court of Appeals, which affirmed the judgment of the District Court (R. 33).

Specifications of Errors to be Urged.

The Circuit Court of Appeals erred:

1. In failing to construe the trust indentures to provide that, upon termination of the trusts, the trust funds were to be immediately distributed to the common lineal descendants of the decedent and his wife or, in the absence

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(Continued from preceding page)

and Elizabeth C. Beach, providing the heirs of both Harry L. Beach and Elizabeth C. Beach are the same persons.

Should the said Harry L. Beach and Elizabeth C. Beach leave no lineal descendants of their direct line, and the next of kin of each were collateral heirs, then said trust fund shall upon the termination of this trust be distributed eighty (80%) per cent to said collateral heirs at law of Harry L. Beach, and twenty (20%) per cent to the said collateral heirs at law of Elizabeth C. Beach." (R. 9-10.) The second indenture contains identical provisions (R. 15).

of common lineal descendants, to the collateral heirs at law of the decedent, without regard to whether the decedent was alive or dead at the time the trusts terminated.

2. In holding that the transfers in trust were transfers by the decedent "intended to take effect in possession or enjoyment at or after his death" within the meaning of section 811(c) of the Internal Revenue Code.

3. In holding that eighty per cent of the value of the remainder interests in the trusts was subject to federal estate tax.

4. In affirming the judgment of the District Court.

Reasons Why a Writ of Certiorari Should be Granted.

1. The decision of the court below is in direct conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *Commissioner v. Kellogg*, 119 F. (2d) 54. The decision is also basically in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *Lloyd's Estate v. Commissioner*, 141 F. (2d) 758, the decision of the United States District Court (New York) in *Post v. United States*, 61 F. Supp. 380, and the decisions of the Tax Court in *Estate of Mabel H. Houghton v. Commissioner*, 2 T. C. 871; *Estate of Margaret D. Sibley v. Commissioner*, 3 T. C. M. 1154, No. 534, October 28, 1944, CCH Dec. 14218(M); *Estate of Tully C. Estee v. Commissioner*, 2 T. C. M. 785, No. 112135, September 17, 1943, CCH Dec. 13,494 (M).

2. The decision of the court below is in direct conflict with the construction presently placed upon Section 811(c) of the Internal Revenue Code by the Treasury Department in Section 81.17, Treasury Regulations 105, as amended by T. D. 5512, May 1, 1946.

3. The case involves a question of great general importance which should be decided by this Court in the in-

terest of uniformity of decision by lower courts and to clarify the scope of recent decisions of this Court.

ARGUMENT.

Examination of the opinion of the court below and of the manner in which it misconstrued the trust indentures is a necessary condition precedent to specific discussion of the reasons why a writ of certiorari should be granted. To the Circuit Court of Appeals, the question was whether "by the terms of two trust instruments * * * all possibility of reversion of interest therein upon any contingency, was successfully excluded." (R. 35.) The focal point of the case was the terms of the trust indentures which were drawn twenty years ago and are identical. These indentures the court construed to provide: for life estates to the decedent's wife and invalid daughter, and to the survivor of them; for termination of the trusts upon the death of the last life tenant; for distribution of the trust property, upon termination of the trusts, to the decedent's lineal descendants, that is his children and grandchildren; and for distribution to the decedent's collateral heirs at law if there were no prior takers. Pursuing the inquiry quoted above which it thought that recent decisions of this Court commanded,[4] the court concluded there were two possibilities that the trusts might fail and the trust funds be returned to the decedent: (1) in the event that the decedent survived the life tenants; and (2) in the event that the decedent survived the life tenants and eligible lineal descendants, that is children and grandchildren. Rejecting any distinction related to the remoteness of either possibility, or between reversions by operation of law and reversions pursuant to an express provision of an indenture, the court

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[4] *Fidelity-Philadelphia Trust Co. v. Rothensies*, 324 U. S. 108; *Goldstone v. United States*, 325 U. S. 687.

therefore sanctioned the imposition of federal estate tax on the irrevocable transfers to the trusts.[5]

The court did not ground its conclusions upon the intention of the decedent. Its statement of the question presented indicates that in reaching its decision it considered only the supposed possibilities that the trusts might fail without regard to the decedent's intention. The court agreed that the decedent intended to give estates to his lineal descendants, that is his children and grandchildren (R. 38, 39), but thought that the reference to the Ohio statutes of descent and distribution required distribution of the trust property to attend the decedent's death.[6] In this respect the court misread the indentures for at least two reasons. In the first place, having agreed that children and grandchildren were to take, the court had exhausted the purpose of the reference, a point which the court obviously overlooked. In the second place, it is apparent that

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[5] It should be noted that the decedent did not reserve a life estate, the clearest imaginable instance of postponement of possession and enjoyment until death of the donor. See *May v. Heiner*, 281 U. S. 238. Nor did the decedent reserve or attempt to reserve any other interest. It is undoubtedly true that failure to express a reserved interest is significant only as the decedent's subjective or implied intention is significant. So also, the nearness or remoteness of a possibility that a decedent will regain the property upon failure of the trust is important only in ascertaining his express or implied intent.

[6] The court also concluded that the trusts might fail upon another contingency. The court thought that if either the decedent or his wife had children by another marriage these would not be common lineal descendants but would prevent the decedent's collateral heirs at law from taking their interests. This is an extremely harsh and wholly unwarranted view of the instruments. It is quite clear from the provisions in question and from the entire indentures that the only purpose and the limiting effect of the provisions were to prevent a child only of the decedent or only of his wife from sharing in the property of the other. Obviously a child only of the wife would not be next of kin or an heir of the decedent. There is no basis for assuming that the existence of such a person was intended to prevent immediate distribution of the funds to anyone else pursuant to the indentures even though he was not eligible to receive an interest in the property.

this reference to the statutes was only to *identify* the takers, not to invoke a different and completely inconsistent means of distribution.[7] There is no provision stating or implying that distribution of the trust property was to be delayed for any reason or period of time after the death of the two life tenants. Nor is there any provision or basis for supposing that the death of the decedent was intended to be or, in fact, was an indispensable condition to the taking of any interest after the life tenancies. It was not his death but the death of the surviving life tenant which was intended to, and did, determine when and what succeeding interests came into possession and enjoyment. That the decedent did not select the most apt words to express his wishes should not be permitted to obscure the fact that his one desire was to provide for his wife, his invalid daughter, and then his other children and his grandchildren—in that order and without delay in the possession and enjoyment of any interest. To the extent that subjective intention can any longer be said to be relevant, it is quite clear that the decedent intended to make and thought he had made a complete disposition of his property. The best evidence of this is the fact that he said so in paragraph 12 of the trust indentures. The trusts were not to be "revocable by any action of the Settlors hereunder, all of the Settlors' rights as to said property having terminated upon the execution of this agreement * * *." (R. 12.) There is no basis whatever for a contention that the decedent *intended* the trusts to fail and thus to regain the trust property.

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[7] There is ample authority that such references and the choice of words usually given technical scope and significance in statutes, must be molded to conform to the intention of the person using them. *McKelvey v. McKelvey*, 43 Oh. St. 213 (1885); *Estate of Mabel H. Houghton v. Commissioner*, 2 T. C. 871; *Barber v. Pittsburgh, etc. Railway Co.*, 166 U. S. 83; Page, *Wills*, Vol. 3, sec. 1011; Simes, *Future Interests*, sec. 147. The court below assumed without question that both lineal descendants and collateral heirs could be identified in the decedent's lifetime when it analyzed the possibility of failure of the trust mentioned in the preceding footnote (R. 39).

In short, then, the court below failed to effectuate the decedent's intention to give life estates to his wife and invalid daughter and, upon termination of the life estates, to provide for immediate distribution of the trust property to his other children and his grandchildren. In the process of thus misinterpreting the trust indentures, the court below mechanically searched them for a possibility that the decedent might regain the trust property, wholly overlooking that the crux of the problem is "whether the transfer * * * is 'intended to take effect in possession or enjoyment at or after his death' by reason of that which he retained." *Helvering v. Hallock*, 309 U. S. 106, 110. Or, to put it differently, in pursuing only the inquiry whether "all possibility of reversion of interest * * * upon any contingency was successfully excluded" (R. 35), the court failed to realize that the real question is whether "the death of the grantor was the indispensable and intended event which brought the larger estate into being for the grantee and effected its transmission from the dead to the living * * *" *Klein v. United States*, 283 U. S. 231, 234. There are therefore the following reasons why a writ of certiorari should be granted:

1. The decision is in direct conflict with the decision of the Circuit Court of Appeals for the Third Circuit in *Commissioner v. Kellogg*, 119 F. (2d) 54. In that case the decedent created a trust of which he and his wife were trustees. Income was payable to the decedent during his life,[8] and, upon his death, to his wife during her life. Upon the death of the survivor of the decedent and his wife, trusts were to be established for their children *then surviving* who were also alive when the original trust was

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[8] The reservation of a life estate makes the *Kellogg* case a much stronger case than the instant one for taxability. Cf. *Helvering v. Hallock*, 309 U. S. 106; *May v. Heiner*, 281 U. S. 238; *Fidelity-Philadelphia Trust Co. v. Rothensies*, 324 U. S. 108; *Commissioner v. Estate of Field*, 324 U. S. 113.

created. Remainders to spouses of children and to grandchildren were provided upon designated contingencies. If all of the eligible children predeceased the decedent and his wife leaving neither spouse, children, nor grandchildren, the trust property was to be distributed to the *then surviving* next of kin of the decedent "in the shares provided by the laws of New Jersey relating to the disposition of personal property in case of intestacy." 40 BTA 916, 917-918. Holding that the estates following the life estates were not vested, the Circuit Court of Appeals recognized that "if the grantor had survived his wife, his children, their respective spouses, and their issue, and his own next of kin, the corpus of the trust would have reverted to him * * * by reason of the failure of the trust." 119 F. (2d) 54, 57. The court affirmed the judgment of the Board of Tax Appeals which had held the trusts not subject to estate tax on the ground that "* * * possible transmission to the next of kin was dependent not upon the grantor's death, but upon the death of various intermediary persons who were all living at the date of the grantor's death. After the decedent's death the acquisition of the corpus by either his children and their descendants or by his next of kin was no more definite and certain than before that event." 40 BTA 916, 920. (Acquiescence by the Commissioner, Cum. Bull. 1945, p. 4.)

From this recital it is apparent that if the Kellogg trusts had failed upon remote contingencies, the decedent would have regained the estate. But the enlargement or enjoyment of the estates after the life tenancies successively depended upon the death not of the decedent but of the life tenants or a preceding remainder man. The same situation occurs here. The estates of the lineal descendants, that is the children and grandchildren, and of the collateral heirs successively depended upon their surviving not the decedent but the two life tenants, and thereafter upon their surviving preceding remaindermen. In both the

instant case and the *Kellogg* case, the death of the decedent was a neutral circumstance.[9]

2. The decision is in direct conflict with the construction presently placed upon Section 811(c) by the Treasury Department. Example (2) of Section 81.17, Treasury Regulations 105, as amended, T. D. 5512, May 1, 1946, states:

> "The decedent, during his life, transferred property in trust, giving the income therefrom to his son for life and the remainder to his son's surviving issue. If no issue survived the life tenant, the property was to revert to the decedent or his estate. This transfer does not satisfy requirement (1) of this section, since the life tenant's surviving issue need not survive the decedent in order to obtain possession or enjoyment of the property. Accordingly, no portion of the property is includible in the gross estate under this section."

In this example, it is apparent that there is an express reservation by the settlor of a reversionary or contingent interest in the trust property which the trust "does not shed * * * until at or after the decedent's death." *Commissioner v. Estate of Field,* 324 U. S. 113, 116. In addition, there is an alternative gift to the decedent's estate, presumably in the event of his prior death. It requires no

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[9] The decision in the instant case is also basically in conflict with the decisions in *Lloyd's Estate v. Commissioner,* 141 F. (2d) 758 (CCA 3, 1944); *Post v. United States,* 61 F. Supp. 380 (USDC, NY, 1945); *Estate of Houghton v. Commissioners,* 2 T. C. 871 (1943); *Estate of Sibley v. Commissioner,* 3 T.C.M. 1154, No. 534, October 28, 1944, CCH Dec. 14,218 (M); and *Estate of Estee v. Commissioner,* 2 T.C.M. 785, No. 112135, September 17, 1943, CCH Dec. 13,494 (M). In none of these cases was there a reserved life estate and there were remainders to persons whose interests awaited the termination of preceding estates. There were ultimate remainders to the settlor, his legal representative, his issue, or his descendants. In the *Post, Houghton* and *Sibley* cases the court correctly construed the indentures to provide for immediate distribution to "descendants" or "issue" of the settlor during the settlor's lifetime. Concerning the *Lloyd* case, see *Goldstone v. United States,* 325 U. S. 687, 690.

argument to demonstrate that there could be no estate and the persons who would participate in its distribution could not be known until at or after the decedent's death. But the reason why the transfer in trust is not taxable is because the persons who were to receive interests after the life estate were required only to survive the life tenant not the settlor. Precisely the same thing is true here. The lineal descendants and the collateral heirs were intended and required to survive not the decedent but the two life tenants. It is therefore apparent that in the light of statements in *Helvering v. Hallock* and subsequent cases, particularly the *Fidelity, Field* and *Goldstone* cases, there is a fundamental conflict between the decision in the instant case and the present construction of Section 811(c) by the Treasury Department. Example (6), qualified by Section 81.18 and constructed along the lines of the decision in *Commissioner v. Kellogg,* 119 F. (2d) 54, is another notable example of this conflict for in that example too, if the settlor survived his next of kin (See Paul, *Federal Estate and Gift Taxation,* 1946 Supplement, p. 188, note 129), the trust property would return to him.

3. The question presented in this case is one of great general importance which should be decided by this Court in the interest of uniformity of decision by lower courts and to clarify the scope of recent decisions of this Court. Since January, 1940, the Commissioner has engaged, in the words of a distinguished commentator, in a "persistent pursuit of almost every trust in the name of the *Hallock* case." Paul, *Federal Estate and Gift Taxation,* 1946 Supplement, p. 171. The inevitable result has been a hopeless conflict of decisions by lower courts concerning the criteria by which the taxability of an *inter vivos* trust is to be determined. In some cases, the remoteness of the possibility that a settlor might regain the trust property has been a determining factor. E.g., *Estate of Allen v. Commissioner,* 3 T. C. 844. In others, the mere existence of such a possi-

bility has been decisive. E.g., *Commissioner v. Bank of California,* 155 F. (2d) 1. In some, the settlor's subjective intention apparently has been significant. E.g., *Frances Biddle Trust v. Commissioner,* 3 T. C. 832. Sometimes, a distinction has been made between express reversions and reversions arising by operation of law. E.g., *Estate of Cass v. Commissioner,* 3 T. C. 562. In other cases, decision has been grounded on the meaning, to the court, of particular words in the indenture. E.g., *Estate of Houghton v. Commissioner,* 2 T. C. 871.

Fundamentally, however, the question and the principles to be used in answering it should be the same in each case. If the basis of taxability provided by Section 811(c) is to govern the imposition of federal estate tax on transfers in trust, the inquiry must extend beyond a mechanical determination that the settlor was or was not successful in excluding "all possibility of reversion of interest * * * upon any contingency" (R. 35); cf. *Commissioner v. Estate of Field,* 324 U. S. 113, 116. In this respect, the instant case is at once illustrative of the confusion concerning the principles which govern taxability in these cases and of the common failure to recognize that the question is not whether the trust could conceivably fail or whether some sort of reversionary interest is remotely possible, but whether the decedent's death, and not, for instance, the death of another person as in the present case, was the intended and indispensable condition to possession and enjoyment of the trust property by anyone else. If the settlor's death is a neutral circumstance in this respect, then the grounding of taxability upon an actual or supposed technical reversion or possible failure of the trust involves the very "niceties of the art of conveyancing," the "great diversities among the several states as to the conveyancing significance of like grants," and the "refined technicalities of the law of property" which the *Hallock* case sought to avoid. *Helvering v. Hallock,* 309 U. S. 106, 112, 117.

In the instant case, the court's statement of the problem confronting it, prefaced by references to recent decisions of this Court, is an ample indication of its misconception of the basic and important question. This same confusion is further illustrated by a comparison of Section 81.17 of Treasury Regulations 105, as amended by T. D. 5512, with the statements of this Court and lower courts in recent cases. See *Fidelity-Philadelphia Trust Co. v. Rothensies,* 324 U. S. 108, 112; *Commissioner v. Estate of Field,* 324 U. S. 113, 116; *Goldstone v. United States,* 325 U. S. 687, 692-693; Paul, *Federal Estate and Gift Taxation,* 1946 Supplement, pp. 170-201. Examination of the current Treasury Regulations and of the decisions of lower courts, particularly of the Tax Court, shows that the general line on the broad question of taxability or non-taxability has been established some distance short of the line which recent statements of this Court appear to have fixed. This is evident in the examples supplied by the Treasury Department in May of this year; in the Commissioner's dismissal of a large number of government appeals in cases of the type presented here, many of which involved remotely contingent interests or possibilities of failure of the trust; and in many decisions of the Tax Court.[10] This situation is further complicated by uncertainty as to the present authority of decisions of this Court such as *May v. Heiner,* 281 U. S. 238, and *Reinecke v. Northern Trust Co.,* 278 U. S. 339. For familiar reasons denial of a writ of certiorari does

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[10] See T. D. 5512, May 1, 1946, quoted in the Appendix; *Commissioner v. Lasker's Estate,* 141 F. (2d) 889; *Commissioner v. Hall's Estate,* 153 F. (2d) 172; *Commissioner v. Irving Trust Co.,* 147 F. (2d) 946; *Commissioner v. Bank of California,* 155 F. (2d) 1; *Post v. United States,* 61 F. Supp. 380; *Estate of Houghton v. Commissioner,* 2 T. C. 871; *Frances Biddle Trust v. Commissioner,* 3 T. C. 832; *Estate of Hunnewell v. Commissioner,* 4 T. C. 1128; *Estate of Fahnestock v. Commissioner,* 4 T. C. 1096; *Estate of Allen v. Commissioner,* 3 T. C. 844. In each of these Tax Court decisions and in a number of others, appeals were taken by the government but were subsequently dismissed.

not cast light upon the views of this Court. See *Bank of California v. Commissioner*, No. 267, October Term, 1946, cert. den. October 14, 1946. It is therefore evident that an authoritative statement by this Court is desperately needed.

Conclusion.

The petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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APPENDIX.

Section 81.17, Treasury Regulations 105:

The statutory phrase, "a transfer * * * intended to take effect in possession or enjoyment at or after his death," includes a transfer by the decedent prior to his death (other than a bona fide sale for an adequate and full consideration in money or money's worth) whereby and to the extent that the beneficial title to the property transferred (if the transfer was in trust), or the legal title thereto (if the transfer was otherwise than in trust), is not to pass from the decedent to the donee unless the decedent dies before the donee or another person, or its passing is otherwise conditioned upon decedent's death; or, if title passed to the donee, it is to be defeated and the property is to revert to the decedent as his own should he survive the donee or another person, or the reverting of the property to the decedent is conditioned upon some other contingency terminable by his death. In such instances, it is immaterial whether the decedent's interest arose by implication of law or by the express terms of the instrument of transfer. Since in such transfers the decedent's death is requisite to a termination of his interest in the property, it is unimportant whether his interest be denominated a reversion or a possibility of reverter, and whether the interest of the donee be contingent or vested subject to be divested, and the tax will apply, unless otherwise provided in the next succeeding paragraph, without regard to the time when the transfer was made, whether before or after the enactment of the Revenue Act of 1916. Thus, upon a transfer by a decedent of property in which an estate for life is given to one and an estate in remainder to another, but with a provision added that the estate in remainder shall revest in the decedent should he survive the owner of the life estate, there is to be included, in determining the value of the decedent's gross estate following his death, the value as of the date of his death of the estate in remain-

der, if the life estate is then outstanding. The value of the outstanding life estate is not to be included in determining the value of the gross estate, unless that estate had been transferred in contemplation of the decedent's death, or otherwise as to render it a part of the gross estate * * *.

Treasury Decision 5512, May 1, 1946:

Section 81.17 of Regulations 105 is amended by changing the heading and the first paragraph to read as follows:

A transfer of an interest in property by the decedent during his life (other than a bona fide sale for an adequate and full consideration in money or money's worth) is "intended to take effect in possession or enjoyment at or after his death," and hence the value of such property interest is includible in his gross estate, if

(1) possession or enjoyment of the transferred interest can be obtained only by beneficiaries who must survive the decedent, and

(2) the decedent or his estate possesses any right or interest in the property (whether arising by the express terms of the instrument of transfer or otherwise).

The decedent shall not be deemed to possess a right or interest in the property if his right or interest consists solely of an estate for his life. (For regulations concerning the separate provision of the statute dealing directly with the case of a life estate retained in property transferred by the decedent, see Section 81.18.) Where possession or enjoyment of the transferred interest can be obtained by beneficiaries either by surviving the decedent or through the occurrence of some other event or through the exercise of a power, sub-paragraph (1) shall not be considered as satisfied unless, from a consideration of the terms and circumstances of the transfer as a whole, the power or event is

deemed to be unreal, in which case such event or power shall be disregarded. Except as provided in the last paragraph of this section, the value of the property so transferred is includible without regard to the date when the transfer was made, whether before or after the enactment of the Revenue Act of 1916.

Example (1). The decedent at 90 years of age transferred property in trust, providing for an estate for life in his granddaughter, 22 years of age, and a remainder to a child of the granddaughter. It was further provided that the estate in remainder would revest in the decedent if he survived the life tenant. Since the property may revert to the decedent and since the beneficiary taking the remainder must survive the decedent in order to obtain possession or enjoyment of the property, the value of the estate in remainder is includible in the decedent's gross estate. The value of the outstanding life estate is not so includible, since the life tenant need not survive the decedent in order to obtain possession or enjoyment thereof.

Example (2). The decedent, during his life, transferred property in trust, giving the income therefrom to his son for life and the remainder to his son's surviving issue. If no issue survived the life tenant, the property was to revert to the decedent or his estate. This transfer does not satisfy requirement (1) specified above, since the life tenant's surviving issue need not survive the decedent in order to obtain possession or enjoyment of the property. Accordingly, no portion of the property is includible in the gross estate under this section.

Example (3). The decedent, during his life, transferred property in trust, giving the income to his wife for her life and the remainder to his father if living at the wife's death. If not, the property was to revert to the decedent if living, and if not, it was to pass to the decedent's issue and their heirs. If the father's death occurs first

followed by the death of the decedent, it would appear at the moment immediately prior to the latter's death that possession or enjoyment of the remainder interest can be obtained only by beneficiaries who must survive the decedent. And since the property may revert to the decedent, requirements (1) and (2) are both satisfied, and the value of the estate in remainder is includible in the decedent's gross estate.

Example (4). The decedent, during his life, transferred property in trust, providing for payment of the income to his son until the latter reached the age of 25, at which time the son would receive the corpus. If the son died before reaching 25, the corpus was to revert to the decedent if living; and if not, it was to pass to his son's heirs. No portion of the property is includible in the decedent's gross estate. Although the property may revert to the decedent, his son can obtain possession or enjoyment of the remainder interest even though the decedent is living. Thus, the first requirement is not satisfied.

Example (5). The decedent transferred property in trust retaining a life estate and giving a succeeding life estate to another, with the remainder to such succeeding life tenant's issue who survived both the decedent and the life tenant. The decedent also retained the power to designate who shall take the remainder in case the succeeding life tenant died without surviving issue. Here, possession or enjoyment of the property can be obtained by the succeeding life tenant and by the succeeding life tenant's issue only if they survive the decedent; thus satisfying requirement (1). Requirement (2) is also satisfied with respect to the interests of both beneficiaries since the decedent retained a right in the entire property, i.e., a contingent power of appointment. The entire value of the property, including the value of the succeeding life estate and the remainder is, therefore, includible in the decedent's gross estate.

Example (6). The decedent transferred property in trust, reserving a life estate and providing succeeding life estates in his wife and son. Upon the death of the son, the principal was to be paid to the son's wife; if the son's wife did not survive her husband, to the son's issue; and if there were no issue, to the decedent's next of kin. In this case, the decedent has parted with every right or interest in the property and hence requirement (2) is not satisfied. Accordingly, no part of the property is includible in the decedent's gross estate.

Example (7). The decedent transferred property in trust to pay the income to his son during decedent's life, and at the decedent's death to pay the principal to his son if living; if not, to his son's issue surviving both the son and the decedent. In this case, the property may revert to the estate of the decedent if neither his son nor his son's issue survives him. Moreover, neither the son nor the latter's issue can obtain possession or enjoyment of the property unless they survive the decedent. The entire value of the estate in remainder is, therefore, includible in the latter's gross estate.

Example (8). The decedent, during his life, transferred property in trust providing for payment of the income to his daughter during the life of the survivor of himself and his wife, and the remainder to his daughter or her issue. The wife was given the unrestricted power to alter, amend or revoke the trust. At the decedent's death, his wife is still living. Here, although it appears immediately prior to the decedent's death that the property may revert by operation of law to the decedent's estate in the event that the daughter and her issue should predecease the decedent and his wife, the first requirement is not satisfied, since the wife can obtain possession or enjoyment of the property during the decedent's lifetime through the exercise of her power to alter, amend, or revoke. No part of the property is, therefore, includible in the decedent's gross

estate. If the wife had predeceased the decedent, requirement (1) would be satisfied, since it would appear immediately prior to the decedent's death that neither his daughter nor her issue, the remaining beneficiaries, could obtain possession or enjoyment of the property unless they survived the decedent. Under these circumstances, the value of the remainder would be includible in the gross estate.

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 729

JAMES W. BEACH, EXECUTOR UNDER THE WILL OF HARRY L. BEACH, DECEASED, PETITIONER

v.

HARRY F. BUSEY, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the District Court (R. 21–24) is reported at 64 F. Supp. 220. The opinion of the Circuit Court of Appeals (R. 35–39) is reported at 156 F. 2d 496.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on July 15, 1946. (R. 33.) The time for filing a petition for a writ of certiorari was extended to December 14, 1946 (R. 43), and the

petition was filed on November 29, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether two substantially identical trust instruments executed by decedent and his wife in 1925 and 1926 are to be interpreted as giving decedent a possibility of reversion, contingent upon his death, as to 80% of the trust property, the percentage of his contribution to the trusts, thus making the transfers ones intended to take effect in possession or enjoyment at or after his death and requiring the inclusion in his gross estate, under Section 811 (c) of the Internal Revenue Code, of the value at his death of 80% of the trust property.

STATUTE AND REGULATIONS INVOLVED

The pertinent statute and Treasury Regulations are set forth in the Appendix, *infra*, pp. 14–19.

STATEMENT

The facts, which were all stipulated except for two documents (R. 23), may be summarized as follows:

On March 2, 1925, and January 23, 1926, respectively, the decedent Harry L. Beach and his wife, Elizabeth C. Beach, as settlors, created two trusts, decedent contributing $80,000 face amount

of United States bonds to each trust and his wife contributing $20,000. Decedent died testate on March 25, 1942. Petitioner, as executor of his estate, filed an estate tax return which did not include any part of the value of the two trusts in decedent's gross estate. The Commissioner determined a deficiency of $18,655.70 on the basis of the inclusion of 80% of the value of the two trusts as of the date of decedent's death. The deficiency was paid under protest, a claim for refund was timely filed and rejected, and this suit followed. (R. 4–6.)

The relevant provisions of the two trusts (R. 8–10, 14–15) are substantially the same (R. 22). After a statement of the transfer to the trustee, each trust provided as follows (see R. 8–10):

> To have and to hold unto said trustee and its successors in trust for the uses and purposes as follows:
>
> 1. To collect the income arising therefrom and from such income, to pay all taxes, assessments, costs and expenses incident to this trust, and thereafter from the net annual income to pay:
>
> (A) To the Settlor, Elizabeth C. Beach, during the life of the Settlor Harry L. Beach, the net annual income from said trust fund.
>
> (B) Upon the death of the Settlor Harry L. Beach, said Trustee shall pay said net annual income jointly to the Settlor Elizabeth C. Beach and Camilla

Beach during their joint lives, and upon the death of either, then the Trustee shall pay said net annual income to the survivor of the said Elizabeth C. Beach and Camilla Beach during the remainder of the life of such survivor.

* * * * *

2. This trust shall terminate upon the death of the last survivor of the Settlor, Elizabeth C. Beach and the daughter of said Settlors, Camilla Beach, and upon the termination of this Trust said trust fund, together with any accumulations thereof, shall be distributed according to the Statutes of descent and distribution of the State of Ohio, to the heirs at law of Harry L. Beach and Elizabeth C. Beach, providing the heirs of both Harry L. Beach and Elizabeth C. Beach are the same persons.

Should the said Harry L. Beach and Elizabeth C. Beach leave no lineal descendants of their direct line, and the next of kin of each were collateral heirs, then said trust fund shall upon the termination of this trust be distributed eighty (80%) per cent to aid collateral heirs at law of Harry L. Beach, and twenty (20%) per cent to the said collateral heirs at law of Elizabeth C. Beach.

* * * * *

On the dates the first and second trusts were created, decedent was 55 and 56 years of age, respectively. (R. 7.)

At the time the first trust was created, decedent had three children and two grandchildren living. When the second trust was created, he had three children and three grandchildren living. His wife, three children, and four grandchildren survived him. The following list shows the name, relationship, and date of birth of decedent's lineal descendants surviving him (R. 6–7):

Camilla Beach—born August 26, 1900—daughter

Nelle Beach (Lynde) Branson—born January 3, 1898—daughter

James W. Beach—born February 4, 1895—son

Henry Beach—born October 3, 1921—grandchild

James Beach—born June 3, 1925—grandchild

Mary Elizabeth Beach—born January 11, 1930—grandchild

Elizabeth Lynde—born June 11, 1923—grandchild

Camilla Beach was an invalid, unable to support or care for herself. (R. 7.)

Interpreting the dispositive paragraphs of the trust instruments, the District Court concluded that, if decedent had survived his wife and daughter Camilla, 80% of the trust property, representing decedent's contribution to the trusts, would, by operation of law, have reverted to decedent free of the trusts. Accordingly, the District Court held that 80% of the value of the

trust property is includible in decedent's gross estate under Section 811 (c) of the Internal Revenue Code. (R. 23–24.) This decision was affirmed on appeal, the Circuit Court of Appeals also interpreting the trust instruments as not excluding the possibility of reversion to decedent. (R. 35–39.)

ARGUMENT

Petitioner asserts that this case involves an important question of law and that the decision below is in conflict with other Circuit Courts of Appeals decisions and with the applicable Treasury Regulations. (Pet. 5–6, 9–15.) These assertions, however, assume the correctness of petitioner's contention that, contrary to the conclusions of the District Court and Circuit Court of Appeals, the dispositive paragraphs of the trust instruments are to be interpreted as precluding any possibility of reversion to decedent. (See Pet. 6–9.) In view of the decisions below, the case here involves only the proper interpretation of the particular trust instruments. We submit that the courts below correctly interpreted the trust instruments and that, accordingly, there is no necessity for further review of the case by this Court.

In making disposition of the trust property, the settlors obviously contemplated that decedent

would predecease his wife and/or daughter Camilla. The trust income is payable to decedent's wife "during the life of the Settlor Harry L. Beach [decedent]." (R. 9, 15.) Decedent's wife and invalid daughter Camilla, and the survivor of them, are to receive the trust income for their lives "Upon the death of the Settlor Harry L. Beach." (R. 9, 14.) There is no provision for distribution of trust income, except after decedent's death, in the event his wife should predecease him. The trusts were to terminate upon the death of the last survivor of decedent's wife and his daughter Camilla, but the disposition to be made of the trust property at that time also assumes that decedent will have died previously. The trust instruments (R. 9, 15) provide that, at the termination of the trusts, the trust funds (R. 9–10)—

> * * * shall be distributed according to the Statutes of decedent and distribution of the State of Ohio, to the heirs at law of Harry L. Beach [decedent] and Elizabeth C. Beach [his wife], providing the heirs of both Harry L. Beach and Elizabeth C. Beach are the same persons.
>
> Should the said Harry L. Beach and Elizabeth C. Beach leave no lineal descendants of their direct line, and the next of kin of each were collateral heirs, then said trust

> fund shall upon the termination of this trust be distributed eighty (80%) per cent to said collateral heirs at law of Harry L. Beach, and twenty (20%) per cent to the said collateral heirs at law of Elizabeth C. Beach.

While the first paragraph no doubt refers only to such heirs as are common lineal descendants of decedent and his wife, nevertheless, since it is elementary that "no one is an heir to the living" (*Hart* v. *Gregg*, 32 Ohio St. 502, 511), these heirs could not be determined until decedent's death. That decedent did not mean presumptive heirs is apparent from the fact that the effectiveness of the provision for alternative disposition of the trust property depends in part on whether decedent and his wife "leave" lineal descendants of their direct line. Disposition of the trust property under the alternative provision also assumes the prior death of the decedent, for such disposition is to collateral heirs at law, who are determinable only at decedent's death. Further, in the event decedent and his wife leave no common descendants, the alternative provision can become effective as to 80% of the trust corpora only if decedent's next of kin are collateral heirs. Next of kin, too, can only be determined at decedent's death.

Accordingly, while the trusts are to terminate at the death of the last survivor of decedent's

wife and daughter Camilla, there is no provision for disposition of the trust property at that time in the event the decedent is still living. It seems clear enough that the decedent simply intended to provide an immediate income to his wife and an income for his invalid daughter Camilla upon his death, with the trust corpora to go to his heirs upon the termination of the trust *after* his death. Certainly there is nothing in the record from which it might be inferred that he wished to make a gift of $160,000 (a large part of his total estate) to his son James or his daughter Nelle, or to distant collateral heirs, effective during his lifetime.

It seems only reasonable to conclude, therefore, that 80% of the trust property, the percentage of decedent's contribution, would have reverted to decedent free of the trusts had he survived his wife and daughter Camilla. See Restatement of the Law, Trusts, Sec. 411. It will be noted that even such provision as was made for disposition of the trust property was predicated on the Ohio statutes of descent, a fact which, as the court below noted (R. 37–38), indicates that the beneficiaries of the corpora were to take by descent rather than by purchase. Cf. the Bryant trust covered by the decision in *Helvering* v. *Hallock,* 309 U. S. 106; *Estate of Low* v. *Commissioner,* 2 T. C. 1114, affirmed *per curiam, sub nom. Orne* v. *Commissioner,* 145 F. 2d 832 (C. C. A. 2d).

The ultimate disposition of 80% of the trust property to decedent's heirs is varied only to the extent that the lineal descendants of decedent and his wife Elizabeth are favored over other possible next of kin of decedent, for example, his lineal descendants by another marriage. This variation, however, created another possibility of reversion to decedent, as the court below held. (R. 39.) Decedent's collateral heirs at law were to take 80% of the trust corpora only if he and his wife Elizabeth left no common lineal descendants and if "the next of kin of each were collateral heirs." Thus, if decedent and his wife Elizabeth left no common lineal descendants and decedent had other lineal descendents, the collateral heirs would not be entitled to take and 80% of the trust corpora would have reverted to decedent by operation of law. The terms of the trust make it clear that the settlors considered the possibility of lineal descendants who were not the lineal descendants of both.

It follows that, contrary to petitioner's contentions (Pet. 8–9, 13), the decedent's death was not a neutral circumstance; on the contrary, up until the time of decedent's death it could not be determined whether the trust property would revert to him or go to others. Except for the interest in his wife during his lifetime, his death was the intended and indispensable condition to possession and enjoyment of the trust property

by anyone except himself, as the court below held. (R. 38–39.) This is the proper basis for taxability, as petitioner concedes. (Pet. 13.) There is therefore no merit to petitioner's assertions (Pet. 9–13), based upon a different construction of the trust instruments, that the decision below is in conflict with *Commissioner* v. *Kellogg,* 119 F. 2d 54 (C. C. A. 3d), and with the applicable Treasury Regulations (Appendix, *infra,* pp. 14–19), and that the instant case is illustrative of the confusion concerning the principles which govern taxability in these cases. The confusion and uncertainty in other respects suggested by petitioner (Pet. 12–15), if existent at all,[1] do not affect this case. As the court below

[1] So far as they are pertinent here, the following cases cited by petitioner merely hold that a possibility of reversion dependent upon the prior death of all next of kin of the decedent is insufficient to support taxability: *Commissioner* v. *Kellogg, supra; Commissioner* v. *Hall's Estate,* 153 F. 2d 172 (C. C. A. 2d); *Commissioner* v. *Irving Trust Co.,* 147 F. 2d 946 (C. C. A. 2d); *Commissioner* v. *Lasker's Estate,* 141 F. 2d 889 (C. C. A. 7th). The courts apparently regard such a possibility of reversion as no interest at all in the decedent and the presently applicable Treasury Regulations accept the authority of these decisions. See Treasury Regulations 105, Sec. 81.17, as amended May 1, 1946, Example (6) (Appendix, *infra,* p. 18). On the other hand, different but somewhat remote, possibilities of reversion have been held by two of the same courts to be sufficient. See *Eldredge* v. *Rothensies,* 150 F. 2d 23 (C. C. A. 3d); *Commissioner* v. *Bayne's Estate,* 155 F. 2d 475 (C. C. A. 2d); see also, *Commissioner* v. *Bank of California,* 155 F. 2d 1 (C. C. A. 9th), certiorari denied, October 14, 1946 (No. 267, October Term,

noted (R. 35), the decisions of this Court sufficiently point the way for decision here. *Helvering* v. *Hallock, supra; Fidelity Co.* v. *Rothensies,* 324 U. S. 108; *Commissioner* v. *Estate of Field,* 324 U. S. 113; *Goldstone* v. *United States,* 325 U. S. 687. The only pertinent question not specifically answered by these decisions is whether a distinction is to be drawn between express reverters and reverters by operation of law. The rationale of the decisions indicates, however, that no such distinction is to be drawn and it has been so held by Circuit Courts of Appeals other than the court below. *Commissioner* v. *Bayne's Estate,* 155 F. 2d 475 (C. C. A. 2d); *Commissioner* v. *Bank of California,* 155 F. 2d 1 (C. C. A. 9th), certiorari denied, October 14, 1946 (No. 267, October Term, 1946). See also, Treasury Regulations 105, Section 81.17 (Appendix, *infra,* pp. 14–19); Paul, Federal Estate and Gift Taxation (1946 Supplement) 196–197.

1946). In other cases cited by petitioner the transfers were not taxable because, unlike the present case, the decedent's possibility of reversion was not contingent upon his death and could be defeated prior to his death. See, e. g., *Lloyd's Estate* v. *Commissioner,* 141 F. 2d 758 (C. C. A. 3d); *Frances Biddle Trust* v. *Commissioner,* 3 T. C. 832; *Estate of Allen* v. *Commissioner,* 3 T. C. 844. The authority of these decisions is incorporated in Example (2) of the presently applicable Treasury Regulations (Appendix, *infra,* p. 16).

CONCLUSION

The decision below is correct and involves no conflict of decisions or important question of law. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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DECEMBER 1946.

APPENDIX

Internal Revenue Code:

> SEC. 811. GROSS ESTATE.
>
> The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—
>
> * * * * *
>
> (c) *Transfers in Contemplation of, or Taking Effect at Death.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death,* * * except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *
>
> * * * * *
>
> (26 U. S. C. 1940 ed., Sec. 811.)

Treasury Regulations 105, promulgated under the estate tax provisions of the Internal Revenue Code:

> SEC. 81.17 [as amended by T. D. 5512, 1946–10 Int. Rev. Bull. 9]. *Transfers intended to take effect at or after the decedent's death.* A transfer of an interest in property by the decedent during his life (other than a *bona fide* sale for an adequate and full consideration in money or money's worth) is "intended to take effect in possession or enjoyment at or after his

death," and hence the value of such property interest is includible in his gross estate, if

(1) possession or enjoyment of the transferred interest can be obtained only by beneficiaries who must survive the decedent, and

(2) the decedent or his estate possesses any right or interest in the property (whether arising by the express terms of the instrument of transfer or otherwise).

The decedent shall not be deemed to possess a right or interest in the property if his right or interest consists solely of an estate for his life. (For regulations concerning the separate provision of the statute dealing directly with the case of a life estate retained in property transferred by the decedent, see section 81.18.) Where possession or enjoyment of the transferred interest can be obtained by beneficiaries either by surviving the decedent or through the occurrence of some other event or through the exercise of a power, subparagraph (1) shall not be considered as satisfied unless, from a consideration of the terms and circumstances of the transfer as a whole, the power or event is deemed to be unreal, in which case such event or power shall be disregarded. Except as provided in the last paragraph of this section, the value of the property so transferred is includible without regard to the date when the transfer was made, whether before or after the enactment of the Revenue Act of 1916.

Example (*1*). The decedent at 90 years of age transferred property in trust, providing for an estate for life in his grand-

daughter, 22 years of age, and a remainder to a child of the granddaughter. It was further provided that the estate in remainder would revest in the decedent if he survived the life tenant. Since the property may revert to the decedent and since the beneficiary taking the remainder must survive the decedent in order to obtain possession or enjoyment of the property, the value of the estate in remainder is includible in the decedent's gross estate. The value of the outstanding life estate is not so includible, since the life tenant need not survive the decedent in order to obtain possession or enjoyment thereof.

Example (*2*). The decedent, during his life, transferred property in trust, giving the income therefrom to his son for life and the remainder to his son's surviving issue. If no issue survived the life tenant, the property was to revert to the decedent or his estate. This transfer does not satisfy requirement (1) specified above, since the life tenant's surviving issue need not survive the decedent in order to obtain possession or enjoyment of the property. Accordingly, no portion of the property is includible in the gross estate under this section.

Example (*3*). The decedent, during his life, transferred property in trust, giving the income to his wife for her life and the remainder to his father if living at the wife's death. If not, the property was to revert to the decedent if living, and if not, it was to pass to the decedent's issue and their heirs. If the father's death occurs first followed by the death of the decedent, it would appear at the moment immediately prior to the latter's death that possession or enjoyment of the remainder interest can

be obtained only by beneficiaries who must survive the decedent. And since the property may revert to the decedent, requirements (1) and (2) are both satisfied, and the value of the estate in remainder is includible in the decedent's gross estate.

Example (*4*). The decedent, during his life, transferred property in trust, providing for payment of the income to his son until the latter reached the age of 25, at which time the son would receive the corpus. If the son died before reaching 25, the corpus was to revert to the decedent if living; and if not, it was to pass to his son's heirs. No portion of the property is includible in the decedent's gross estate. Although the property may revert to the decedent, his son can obtain possession or enjoyment of the remainder interest even though the decedent is living. Thus, the first requirement is not satisfied.

Example (*5*). The decedent transferred property in trust retaining a life estate and giving a succeeding life estate to another, with the remainder to such succeeding life tenant's issue who survived both the decedent and the life tenant. The decedent also retained the power to designate who shall take the remainder in case the succeeding life tenant died without surviving issue. Here, possession or enjoyment of the property can be obtained by the succeeding life tenant and by the succeeding life tenant's issue only if they survive the decedent; thus satisfying requirement (1). Requirement (2) is also satisfied with respect to the interests of both beneficiaries since the decedent retained a right in the entire property, i. e., a contingent power of appointment. The entire value of the property, including

the value of the succeeding life estate and the remainder is, therefore, includible in the decedent's gross estate.

Example (*6*). The decedent transferred property in trust, reserving a life estate and providing succeeding life estates in his wife and son. Upon the death of the son, the principal was to be paid to the son's wife; if the son's wife did not survive her husband, to the son's issue; and if there were no issue, to the decedent's next of kin. In this case, the decedent has parted with every right or interest in the property and hence requirement (2) is not satisfied. Accordingly, no part of the property is includible in the decedent's gross estate.

Example (*7*). The decedent transferred property in trust to pay the income to his son during decedent's life, and at decedent's death to pay the principal to his son if living; if not, to his son's issue surviving both the son and the decedent. In this case, the property may revert to the estate of the decedent if neither his son nor his son's issue survives him. Moreover, neither the son nor the latter's issue can obtain possession or enjoyment of the property unless they survive the decedent. The entire value of the estate in remainder is, therefore, includible in the latter's gross estate.

Example (*8*). The decedent, during his life, transferred property in trust providing for payment of the income to his daughter during the life of the survivor of himself and his wife, and the remainder to his daughter or her issue. The wife was given the unrestricted power to alter, amend or revoke the trust. At the decedent's death, his wife is still living. Here, although it

appears immediately prior to the decedent's death that the property may revert by operation of law to the decedent's estate in the event that the daughter and her issue should predecease the decedent and his wife, the first requirement is not satisfied, since the wife can obtain possession or enjoyment of the property during the decedent's lifetime through the exercise of her power to alter, amend, or revoke. No part of the property is, therefore, includible in the decedent's gross estate. If the wife had predeceased the decedent, requirement (1) would be satisfied, since it would appear immediately prior to the decedent's death that neither his daughter nor her issue, the remaining beneficiaries, could obtain possession or enjoyment of the property unless they survived the decedent. Under these circumstances, the value of the remainder would be includible in the gross estate.

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